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NOTES

TRUST COMPANIES AND THE "PRACTICE OF LAW."—When the New York Court of Appeals in 1910 made its decision in "*Re Co-operative Law Co.*,"[1] it established the now universally conceded proposition that a corporation cannot practice law. The statute[2] under discussion in that case provided that "three or more persons may become a stock corporation for any lawful business." It was argued that since the practice of law was a lawful business, the incorporation of three or more persons for that purpose was within the statute. But the practice of law is not a lawful business save to those who have complied with certain statutory requirements and who have fulfilled the conditions

[1]198 N. Y. 479, 92 N. E. 15 (1910).
[2]Chap. 483, Laws of 1909 (N. Y.).

required by the rules of court. "The right to practice law is in the nature of a franchise from the State, conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. . . . No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal." It is evident that a corporation cannot perform these conditions; and it therefore would seem to follow that the practice of law is not a lawful business in which a corporation can engage. And since it cannot practice law directly, neither can it do so indirectly by employing members of the bar to practice for it. The law will not tolerate such an evasion.[3] When legislatures, therefore, in authorizing the formation of corporations, use the general expression "any lawful business," they do not intend to include the work of the learned professions wherein personal skill and personal responsibility are the prime essentials.[4]

Within the last fifty years, there have developed certain types of corporation to fill very apparent and growing needs. In all communities, whenever a piece of property was sold, there was an examination of the title; and if it were sold again, there had to be another examination, and so on. The result was delay and needless expense to the public; and the outcome is the present-day title company, which examines the title, insures it, and saves the expense to the public.

In a like manner, trust companies were brought into being to fill a public need. Estates were left to individual executors or trustees, who might or might not be careless or dishonest, but whose personal ability and conscience were the only safeguards on which the heirs or *cestuis qui trustent* could rely. The trust companies were incorporated to give the public the absolute protection which this condition showed to be necessary. The affairs of the incorporated trustee or executor are watched over carefully by the State. The trust company never removes, falls ill, or dies. The heirs or the *cestuis qui trustent* are always insured that protection which the testator would wish to be exercised.

It is not strange that these title and trust companies, in the performance of their duties as such, should perform certain incidental acts which the individual title examiner or trustee would find necessary to do in similar circumstances. And since, before the advent of trust companies, the individual title examiner or trustee was usually a lawyer, it follows that title and trust companies are today doing certain things which in the past were generally considered to be within the province of the lawyer.

[3] "*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*" Co. Litt. 223.

[4] Commonwealth v. Alba Dentist Co., 13 Pa. Dist. Rep. 432 (1904) (*Dentistry*); People v. Woodbury Dermatological Inst., 192 N. Y. 454, 85 N. E. 697 (1908) (*Medicine*).

The realization of this fact has led to country-wide discussion by members of the bars of the various states,[5] and has finally crystallized in the prosecution and acquittal of a New York corporation. The difference of opinion which prevails concerning the right of corporations to do certain things heretofore done by lawyers is shown by the fact that the Court of Appeals of New York, by a divided court, reversed the judgment of the Supreme Court which had affirmed the conviction. The facts of the case, that of *People v. Title Guarantee & Trust Co.*,[6] are typical of what is being done by most of the title and trust companies. There was no pretense or holding out by advertisement or otherwise that the company was entitled to practice law. There was no legal advice given. In the course of its business, the company was called on to draw a bill of sale and a chattel mortgage, and it did so. New York has a penal statute[7] which declares: "It shall be unlawful for any corporation . . . to hold itself out to the public as being entitled to practice law, or render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law. . . . This section shall not apply to any corporation . . . lawfully engaged in the examination and insuring of titles to real property. . . . But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in the State."

Under this statute, the company was prosecuted. It was argued that, though not requiring deep legal knowledge, the drafting of a bill of sale and a chattel mortgage is work which is usually done by lawyers, and since advice as to change of possession of the chattels and filing the mortgage should be given, the whole transaction constituted the practice of law.

No one will deny that the "practice of law," as the term is now commonly used, embraces much more than the conduct of litigation. The concise definition given by the Supreme Court of the United States has been taken as authority in numerous cases: "Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law, within the meaning of that designation as employed in this country".[8]

Is the drawing of wills, deeds, bonds, mortgages, bills of sale, and other like instruments the "practice of law" sufficient to convict the title and trust companies which do such work in

[5]See: The American Bar Assoc. Journal for January, 1920, pp. 19-31; Reports of State Bar Assoc. of Wisconsin, Vol. 12, pp. 587-614.

[6]125 N. E. 666 (1919).

[7]See 280 Penal Law (Consol. Laws, C. 40).

[8]Savings Bank v. Ward, 100 U. S. 195, 199 (1879); *Re* John T. Duncan, 83 S. C. 186, 65 S. E. 210 (1909).

the course of the business for which they are incorporated? The test is not whether the act done is one which is commonly performed by an attorney. The inquiry is rather whether it is an act which might lawfully be performed by a layman. The basis of decision should be the nature of the act, and not the identity of the individual who most frequently performs it.

To support the contention that the title and trust companies cannot draw such papers for pay is to hold that such work is the professional business of the lawyer exclusively. That contention is against legal history and tradition. The advocate never did the work of a conveyancer. The *scrivarius* of the civil law and his successor, the continental notary public, always did such clerical work and were never admitted to the ranks of professional lawyers.[9] In England, the notary public was always allowed to prepare deeds, agreements, wills, and other papers relating to real and personal property.[10] Indeed, far from being the ancient right of lawyers only, the preparation and execution of instruments to alienate land and conveyancing in general were not even open for attorneys or solicitors to engage in before 1760. The Scriveners' Company had a close monopoly of all such business; and not until that year did the "Society of Gentlemen Practisers in the Courts of Law and Equity" gain the right also to draw such instruments.[11]

Stronger, however, than the historical proof that such business is not the exclusive privilege of lawyers is the fact that in all the jurisdictions of the United States laymen have been accustomed to draw such instruments, not merely as a matter of accommodation for friends and neighbors, but for pay. Indeed, the New York court in the case under discussion[12] took judicial notice of this practice. And when Congress laid revenue duties on different pursuits and professions, it recognized the wide range of legal services by persons not attorneys at law. It grouped these under the name "Conveyancer," which the act[13] defined as: "*Every person*, other than one having paid the special tax as a lawyer or claim agent, *whose business* it is to draw deeds, bonds, mortgages, wills, writs, or other legal papers, or to examine titles to real estate."

If the drafting of legal documents could be done only by lawyers, then it would seem to follow that communications between the client and the one doing his conveyancing would be privileged. But it is universally held that where an attorney

[9]Wright: French Civil Code, arts. 971, 972; Goirand: French Commercial Law, pp. 9, 10, 19; Todd: Belgian Law with Codes of Commerce & Procedure p. 11.

[10]Halsbury's Laws of England, Vol. 21, Sec. 817; King v. Scriveners' Co., 10 Barnewall & Cresswell 511 (Eng. 1830).

[11]Encyc. Laws of England (2nd Ed.) Vol. 13, p. 438 "Solicitor."

[12]125 N. E. 666 (1919).

[13]Act Cong. July 13, 1866, C. 184, Sec. 9, 14 U. S. Stat. at Large p. 118.

is employed merely to put in legal form and phrase certain documents or agreements of the parties, the fact that he is skilled in law will not make him incompetent as a witness, nor can the communication made by the parties to him be considered as privileged.[14] From this it appears that conveyancing is not the practice of law and the conveyancer not only is not required to be an attorney-at-law but cannot be considered as acting in the capacity of an attorney-at-law. How, then, is it possible to escape the conclusion that when a title or trust company drafts legal papers ancillary to its business it is not practising law?

In Pennsylvania, a lower court opinion[15] contains a dictum to the effect that a title insurance company cannot do conveyancing of any kind. But the statutory provision[16] in regard to the powers of such companies is "to make insurances of every kind pertaining to or connected with titles to real estate, and to make, execute and perfect such and so many contracts, agreements, policies, and other instruments as may be required therefor." Under this statute it would seem that any conveyancing done incidental to the generally conceded duties of a title and trust company is not *ultra vires*. Certainly, it is not the practice of law.

There can be no debate of the proposition that the standards of the legal profession should be maintained at a very high level. Nor is it contested that much more harm comes to the public from ignorance and carelessness than from the intentional misconduct of those who have succeeded in securing the right to practice law. But this does not furnish a reason for conferring upon attorneys the exclusive right to render certain services as if they were incapable of being performed by a layman when common and long-established practice points in a different direction. And if these services are not the usurpation of the lawyers' duties when rendered by laymen, neither are they the "practice of law" when performed by title or trust companies.

A. L.

A NEW CONCEPTION OF RESTRAINT IN FALSE IMPRISONMENT.—The gist of the wrong of false imprisonment, which is the violation of the right of personal liberty, is the unlawful restraint of the freedom of the person. As stated by Blackstone: "To constitute the injury of false imprisonment there are two points requisite: (1) the detention of the person; and (2) the unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the

[14]Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258 (1912); Spencer v. Razor, 251 Ill., 278, 96 N. E. 300 (1911); Dikeman v. Arnold, 78 Mich. 455, 44 N. W. 407 (1889); Van Alstyne v. Smith, 82 Hun. 382, 31 N. Y. S. 277 (1894); See also Estate of Mathews, 1 Phila. 292 (1852).

[15]Gauler v. Solicitor's Loan & Trust Co., 9 Pa. C. C. Rep. 634 (1891).

[16]Act of May 9, 1889, P. L. 159.